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No. 731

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

SPERRY GYROSCOPE COMPANY, DIVISION OF SPERRY RAND CORPORATION,

Petitioner,

v.

ENGINEERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Statement.

Petitioner Sperry and Respondent EA entered into a collective bargaining agreement which provides for the arbitration of unresolved "disputes, differences or grievances arising out of the interpretation and application of the provisions of this Agreement" (R. 4).

The following dispute arose:

The Agreement establishes minimum wage rates and provides that Sperry may grant salary increases above

such minimum rates "on a merit basis *only*" (R. 5; Art. 18, Par. H, p. 30 of Ex.)[1]

Sperry gave salary increases to a number of employees who accepted transfers to a company plant in another geographical area (R. 4-5, 15-16; Ex. C, R. 10-12). Employees who were offered such a transfer but who refused to accept it, received no increase (R. 5).

Sperry labelled the increases "merit" (R. 5, 49-53).

EA claimed the increases were not "merit", but were given *now* to employees who agreed to accept transfers to a different plant at a future time when such plant would become available for operations (R. 61, 4-5; Ex. C, R. 10-12). EA filed a grievance (Ex. 1, R. 39-41).

If the increases were truly "on a merit basis only", the Agreement permits Sperry to grant them unilaterally (Art. 18, Pars. E and H, pp. 29, 30 of Ex.).

However, if the increases were on the basis of considerations other than "merit only", Sperry may not grant them unilaterally (Ex. C, R. 10-12).

The dispute was processed through the grievance procedure without being resolved (R. 6-7; Ex. C, R. 12; R. 54-57).

EA demanded arbitration of whether the increases in question were or were not "on a merit basis only" (R. 5; Ex. C, R. 10-12).

Sperry unequivocally refused to arbitrate this dispute, saying it would go to court before arbitrating (R. 57, 66).

Petitioner asserts that the parties had agreed to process the dispute through the grievance procedure a second time if EA rejected Sperry's proposed settlement (R. 17). EA

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[1] "Ex" refers to the collective bargaining agreement which was certified as a separate exhibit by the Clerk of the Court of Appeals.

refutes this assertion and points to the undenied fact that Sperry refused to arbitrate categorically and not because the grievance procedure should have been utilized a second time for the same dispute (R. 54-57).

EA commenced a proceeding to compel arbitration in the District Court for the Southern District of New York by filing and serving a verified petition (R. 3-8) and notice of motion (R. 2). The petition based the Court's jurisdiction on "Section 301 of the Labor Management Relations Act, 1947, U. S. C. Title 29, Section 185 and the United States Arbitration Act, U. S. C. Title 9" (R. 3). The notice of motion recited that it was brought "pursuant to Sections 4 and 6 of the United States Arbitration Act, U. S. C. Title 9 and upon the annexed petition" (R. 2).

Sperry, therefore, had full notice that the proceeding to compel arbitration was based upon *both* Section 301, LMRA of 1947 and Sections 4 and 6 of the United States Arbitration Act.

Sperry appeared and submitted an answering affidavit and exhibits on the merits (R. 14-53).

Sperry did not raise any question as to service of a summons or as to the summary nature of the proceeding in the District Court. The District Court rendered judgment compelling Sperry to arbitrate (p. 28, Petitioner's brief).

Sperry appealed and, for the first time, raised the questions of (a) not having been served with summons and (b) the summary nature of the proceeding in which the judgment compelling arbitration was rendered.

The Court of Appeals affirmed the judgment (p. 19, Petitioner's brief).

The crux of Sperry's petition to this Court is that, under *Textile Workers Union of America* v. *Lincoln Mills*, 353

U. S. 448, 77 S. Ct. 912, the jurisdiction of a federal court to compel arbitration pursuant to the terms of a collective bargaining agreement is based upon Section 301, LMRA, 1947; therefore, only a plenary suit commenced by summons, rather than a summary proceeding commenced by notice of motion, could be the basis for a judgment compelling arbitration.

Certiorari Should Be Denied.

1. EA's petition (R. 3) and notice of motion (R. 2) expressly announced to Sperry that the proceeding to compel arbitration was based on Section 301 of the Labor Management Relations Act as well as upon the United States Arbitration Act. Sperry elected to resist the proceeding on the merits by answering affidavit and exhibits (R. 14-49) as well as rebuttal affidavit and exhibit (R. 68-82). It did not elect to raise the question that summons and plenary suit alone could be the sole conduit to the relief sought by EA. Sperry cannot escape the judgment compelling arbitration by asserting this defense for the first time on appeal. Rule 12(b) and (h), Federal Rules of Civil Procedure; *Carter* v. *Powell*, 104 F. 2d 428, 430 (C. A. 5, 1939), rehearing denied 104 F. 2d 1012, cert. denied 308 U. S. 611, 60 S. Ct. 173; *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 139 F. 2d 871, 874 (C. A. 3, 1944), cert. denied 322 U. S. 740, 64 S. Ct. 1057; see 3 Cyclopedia of Federal Procedure (3rd Ed.) 325, Section 11.05.

It is clear, therefore, that this case is not the suitable vehicle to test whether arbitration may be compelled, under Section 301 of the Labor Management Relations Act, by plenary suit rather than by summary proceeding.

Sperry argues, further, that the proceeding cannot be treated as a motion for summary judgment because there exists an issue of fact as to whether or not the parties agreed to process their dispute through the grievance procedure a second time (Petitioner's brief, p. 15).

However, Sperry does not deny that, after EA demanded arbitration, Sperry on two occasions categorically refused to arbitrate the grievance, stating it would go to court before it would arbitrate (R. 57, 66). In the light of this unrefuted refusal to arbitrate, it would be a futile gesture for EA to process the dispute through the grievance procedure a second time. The asserted issue of fact urged by Sperry as a barrier to summary judgment thus becomes drained of any legal probative force and fails to achieve the status of a "genuine issue as to any material fact." Rule 56, Federal Rules of Civil Procedure. It may not, therefore, preclude summary judgment. *Durasteel Co.* v. *Great Lakes Steel Co.*, 205 F. 2d 438, 441 (C. A. 8, 1953).

2. The district court assumed jurisdiction under Section 301 of the Labor Management Relations Act and utilized the United States Arbitration Act to provide the remedy of compelling Sperry to arbitrate (Opinion of District Court, p. 29 of Petitioner's brief). The Court of Appeals affirmed, relying solely upon Section 301 as the source of jurisdiction (Opinion of Court of Appeals, p. 20 of Petitioner's brief).

The courts followed different paths to reach the same result. But this no longer raises an important and unsettled question for this court. *General Electric Company* v. *Local 205, United Electrical, Radio and Machine Workers of America*, 353 U. S. 547, 77 S. Ct. 921 (1957).

3. Sperry interprets the issue found to be arbitrable by the Court of Appeals as being different from the issue which EA sought to arbitrate (Petitioner's brief, pp. 16-17). It is clear that the issue found to be arbitrable is whether particular increases were "on a merit basis only" and, as such, squares with the issue which EA sought to arbitrate (Ex. C, R. 10-12).

This issue raises neither a federal question of substance nor an important question of federal law.

4. The Court of Appeals looked to compatible New York law and to the Federal Arbitration Act as "a guiding analogy"[2] in order to find the rule that would best effectuate the federal policy, when affirming the judgment compelling Sperry to arbitrate. In so doing, the Court of Appeals was guided by this Court's decision in *Lincoln Mills, supra.* Sperry insists greater weight should have been accorded certain specific New York lower court decisions urged by Sperry as dispositive of the issue herein. This raises no substantial question as to the proper weight to be given State law generally in enforcing collective bargaining agreements under Section 301 of the Labor Management Relations Act. The approach of the Court of Appeals is consonant with the "policy of our national labor laws" to further, rather than frustrate, the arbitration of labor controversies pursuant to agreement of the parties. *Textile Workers* v. *Lincoln Mills, supra; Textile Workers Union* v. *American Thread Co., supra*; *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163 (S. D. N. Y. 1954), app. dismissed 224 F. 2d 176 (C. A. 2, 1955), cert. denied 350 U. S. 834; Section 201, Labor Management Relations Act, 1947.

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[2] *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137 (D. C. Mass. 1953).

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: March 27, 1958.

Respectfully submitted,

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